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IN THE SUPREME COURT OF THE UNITED STATES

ALMON GLENN BRASWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

I. Whether the United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law in a way that conflicts with several relevant decisions of this Court, including In re Winship, Cage v. Louisiana, Sullivan v. Louisiana and Teague v. Lane.

II. Whether the Court should resolve a conflict among the circuits on the important question of what showing of collateral consequences must be made in order to obtain coram nobis relief.

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STATEMENT OF BASIS FOR JURISDICTION

The decision sought to be reviewed was entered by the Eleventh Circuit Court of Appeals on October 4, 1999. Pursuant to 28 U.S.C. § 1254, this Court possesses jurisdiction to review on certiorari the decision in question.

STATEMENT OF THE CASE

A. Chronology of Proceedings:

In 1983, Petitioner was indicted on two counts of perjury, pursuant to 18 U.S.C. § 1623. He pled not guilty to both counts and a jury trial was had in September of 1983. At trial, Petitioner was acquitted of count one and convicted of count two. Petitioner was sentenced on December 5, 1983 to three years imprisonment, to run concurrently with a sentence imposed in two related mail fraud and tax cases to which he pled pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). On August 20, 1984, the court, on Petitioner's motion, reduced Petitioner's sentence to time served. Therefore, Petitioner has fully served his sentence and is not now incarcerated. Petitioner took no appeal from his conviction or sentence.

On September 25, 1997, Petitioner filed a Petition for Writ of Error Coram Nobis with the United States District Court for the Northern District of Georgia, Atlanta Division. The basis for federal jurisdiction in the district court was the All Writs Act, 28 U.S.C. § 1651(a).

The Government filed a response in opposition to the petition on December 4, 1997, and an Order dismissing the petition was entered by the district court on January 30, 1998. Petitioner filed a Motion for Reconsideration of the district court's Order on February 13, 1998, followed by three

supplements to the Motion for Reconsideration and an Amended Motion for Reconsideration. By final Order dated April 16, 1998, the district court denied Petitioner any relief.

Petitioner timely filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on April 23, 1998 and an Amended Notice of Appeal was filed on April 27, 1998. That appeal was the first and only appeal filed enumerating error as to Petitioner's perjury conviction.

On October 4, 1999, the Eleventh Circuit Court of Appeals entered an Order affirming the district court's denial of Petitioner's petition for a writ of error coram nobis. This Petition for a Writ of Certiorari is timely filed, in accordance with Supreme Court Rule 13, within 90 days of the entry of the Eleventh Circuit's decision.

B. Statement of Facts:

No transcripts or court reporter's notes of the trial of the perjury counts are available. The guilty pleas and sentencing transcripts in the separate cases also disposed of in 1983, however, are available. Other than providing general background information, these two transcripts and the presentence report were not necessary for the Eleventh Circuit's determination of the issues raised in Petitioner's appeal.

Few facts found by the trial court relative to the perjury case are in dispute. The court, in keeping with then-current precedent,[1] did not charge the jury on materiality, an essential element of the offense of making false statements. Instead, the trial judge simply instructed the jury that he had determined the allegedly false statement at issue in count two

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[1] See, e.g., United States v. Lopez, 728 F.2d 1359 (11th Cir. 1984).

to be material as a matter of law. Importantly, the district court candidly stated in its written Order dismissing the coram nobis petition that it made no finding that it had determined "materiality" using a "beyond a reasonable doubt" standard:

> More importantly, it is unclear whether any "burden of proof" is ever applied to questions of law. Something either is or is not the law; there are not degrees analogous to burdens of proof in fact finding.

(Appendix, Exhibit 1, Page IV, n. 2).

Notwithstanding its concession that it engaged in no fact-finding regarding materiality and notwithstanding its dubious conclusion that it is "unclear whether any 'burden of proof' is ever applied to questions of law," the trial court dismissed the Petitioner's coram nobis petition on the basis that Petitioner could not prove that his criminal conviction resulted from the application of a less than reasonable doubt standard. The Eleventh Circuit affirmed the district court's dismissal of the petition but, significantly, failed to refer to, let alone discuss, the district court's statement regarding its admitted failure to apply the Constitutionally-mandated "beyond a reasonable doubt" standard.[2]

The impact of the conviction has directly affected many aspects of Petitioner's business and personal life. The record in the courts below contains supporting affidavits showing significant collateral consequences that have resulted from the conviction. Specifically, Petitioner has

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[2] Rather, the Court of Appeals, citing to an affidavit of Petitioner's trial counsel filed before the trial judge conceded the correct standard was not applied, found that Petitioner failed to prove that a reasonable doubt standard was not used.

incurred substantial expenses in connection with psychological therapy; he has found his credibility continually called into question in certain business dealings, particularly civil litigation, to the extent that he has been advised by counsel to settle a case rather than testify because of the fear of impeachment; he has even been advised by counsel not to pursue an employee who embezzled a substantial sum of money from his company because of the fear that Petitioner's version of the facts would not be believed. Additionally, Petitioner has attempted to merge his business with publicly and privately-owned companies, an effort that has proven problematic because of the necessity to disclose his prior felony perjury conviction.

ARGUMENT

I. The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law in a way that conflicts with several relevant decisions of this Court.

A. Introduction

Over the last five years, this Court has addressed the issue of materiality in fraud and false statement prosecutions on several occasions. In United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995), the Court held that the jury, not the judge, was assigned the task of determining whether a false statement is material, because materiality is an essential element of the offense. In Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 137 L.Ed.2d 718 (1997) and Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999), the Court addressed the consequences of a trial court's failure to comply with Gaudin's rule. Johnson held that it was plain error, but did not necessarily affect substantial rights of the defendant. Neder concluded that Gaudin error could be harmless.

The focus of this Petition is on an issue that transcends the faulty assignment of factfinding roles in a criminal trial. Here, the issue is what the consequence is when the factfinder employs a standard of proof less demanding than proof beyond a reasonable doubt on an essential element of the offense charged.

In short, because Petitioner does not challenge a Gaudin-type error, neither the "plain-error" rule of Johnson v. United States, 117 S. Ct. at 1548, nor the "harmless error" standard of Neder v. United States, 119 S. Ct. at 1834, applies.

Rather, the issue raised by this petition is one that was not addressed by this Court's decision in Gaudin – namely, *how* must the factual determination of materiality be made in order to satisfy Constitutional standards. That very issue – that all elements of a criminal offense be proven beyond a reasonable doubt – Petitioner contends is embraced by the holdings of this Court in In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970) and Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L.Ed.2d 339 (1993). Error committed – regardless of whether by the trial judge or the jury – in making such an important determination is considered to be "structural" in nature. It is error of such a magnitude as to undermine the fairness of the trial and alter the Constitutional calculus guaranteed to the defendant. See Nutter v. White, 39 F.3d 1154, 1158 (11th Cir. 1994).

The Court of Appeals decision below readily acknowledged the unique standing of this issue then before it by characterizing it as an attempt by Petitioner to "slide through a notch left open [by the Eleventh Circuit] in [United States v.] Swindall. . . ." 107 F.3d 831, 835 (11th Cir. 1997). (Appendix, Exhibit 2, Page XIII). As the following discussion demonstrates, that "notch" is whether the judge, in

a pre-Gaudin trial, used a less exacting proof standard than "beyond a reasonable doubt" in its determination that Petitioner's allegedly false statement was material. As the Eleventh Circuit recognized, and as this petition argues, such a Constitutional infirmity must be likened to the erroneous reasonable doubt instruction in Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2082, 124 L.Ed.2d 182 (1993), which "vitiates all the jury's findings . . . [because a] reviewing court can only engage in pure speculation . . . of what a reasonable jury would have done." Id., 508 U.S. at 281.

B. The Eleventh Circuit's decision conflicts with this Court's decision in In re Winship.

This Court, in In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970), explained that the reasonable doubt standard is fundamental to our system of criminal procedure and to principles of due process:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

The Court further noted:

> It is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion – basic in our law and rightly one of the boasts of a free society – is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."

Id. at 362 (citing Leland v. Oregon, 343 U.S. 790, 802-3, 72 S. Ct. 1002, 96 L.Ed. 1302 (1952)(dissenting opinion)). See also Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977) (the prosecution must "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.")

Implicit in the holding of In re Winship is this Court's acknowledgement that there are certain features of a criminal trial that are so fundamental that their absence is considered virtually fatal to the vitality of the judgment. The standard of proof required by Winship, that the government prove each fact or element of the crime beyond a reasonable doubt, is one such feature. Indeed, in the Eleventh Circuit, where Plaintiff was tried, it has been equated to the requirement that the defendant be afforded the right to counsel. Nutter v. White, 39 F.3d 1154 (11th Cir. 1994) (holding that erroneous instruction to the jury on the correct burden of proof is an error that is subject to collateral attack, regardless of the finality of the judgment, and comparing this structural component of a trial to the right to counsel guaranteed by Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963)).

In this case, a fundamental error violating the strictures of In re Winship occurred when the decision-maker (i.e., the judge) failed to employ the correct standard in deciding whether Petitioner's allegedly false statement was material beyond a reasonable doubt. This was not an error of mere procedural irregularity; this was a profound violation of the Petitioner's right to due process and resulted in a judgment that lacked the most elemental characteristic of a fair disposition – a disposition that reflected an accurate finding of the fact that the statement alleged by the government as false was material to the subject of the legal proceeding in which it was made.

Indeed, in the coram nobis order appealed from in this case, the trial court essentially conceded that it did not perform *any* fact-finding and, therefore, did not employ a reasonable doubt standard prior to instructing the jury that the subject matter of Petitioner's allegedly false statements was material to the charges it was asked to consider:

> More importantly, it is unclear whether any "burden of proof" is ever applied to questions of law. Something either is or is not the law; there are no degrees analogous to burdens of proof in fact finding.

(Appendix, Exhibit 1, Page IV, n. 2). Even a cursory review of the trial court's standard for determining materiality – "there are no degrees analogous to burdens of proof in fact finding" – leads to the inexorable conclusion that the trial court used no reasonable doubt standard to determine materiality, in violation of In re Winship, supra.

Because, under these circumstances, the Eleventh Circuit's decision affirming the district court's dismissal of the coram nobis petition is in irreconcilable conflict with this Court's decision in In re Winship, it is clear that the present Petition for a Writ of Certiorari should be granted.

C. The Eleventh Circuit's decision also conflicts with this Court's decisions in Cage v. Louisiana, Sullivan v. Louisiana and Johnson v. United States.

As this Court has recently held, there are several types of structural errors affecting the framework within which a trial proceeds that will support a petition for a writ of error coram nobis. See Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 1548, 137 L.Ed.2d 718 (1997).

In Johnson, the Court recognized that the type of error at issue in Sullivan v. Louisiana, supra, -- an erroneous reasonable doubt instruction to the jury --affects the very framework within which the trial proceeds. As the Court recognized, an erroneous reasonable doubt instruction "vitiated all of the jury's findings because one could only speculate what a properly charged jury might have done." Id., 113 S. Ct. at 1550 (citing Sullivan v. Louisiana).[3]

Here too, Petitioner established in the courts below that the very error that was the subject of his petition for a writ of error coram nobis is an error that implicates the structural Constitutional principles of Cage and Sullivan. Specifically, as Petitioner pointed out to the Eleventh Circuit, the district court's admitted failure to decide the materiality issue beyond a reasonable doubt violated the requirements of Cage and Sullivan. As Sullivan recognized, such an error effectively vitiated all of the jury's findings. Here, it is impossible to ascertain what might have transpired had the trial court determined *beyond a reasonable doubt* whether the allegedly false statements were material, as Cage and Sullivan require. For this reason, it is apparent that the Eleventh Circuit should have reversed the decision of the district court denying the petition for a writ of error coram nobis.

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[3] Sullivan was based on this Court's ruling in Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L.Ed.2d 339 (1990), which held that a "reasonable doubt" jury instruction "essentially identical" to the one reviewed in Sullivan was improper.

1. Contrary to the Eleventh Circuit's decision, the district court's error implicates the structural principles of Cage v. Louisiana and Sullivan v. Louisiana, rather than the principles of United States v. Gaudin.

In its decision, the Eleventh Circuit reached the incorrect conclusion that, like the appellant in United States v. Swindall, 107 F.3d 831 (11th Cir. 1997), Petitioner is complaining only of a Gaudin-type error. However, unlike the circumstances in Swindall, it is not the mere fact that the trial court, rather than the jury, determined materiality that is at issue. Rather, it is the trial court's admitted failure to apply a beyond a reasonable doubt standard to its materiality determination that infects Petitioner's conviction.

In fact, a reading of the Eleventh Circuit decision in United States v. Swindall, supra, highlights the significant difference between that case and this one. In Swindall, the court had before it one issue – whether the trial court's failure to allow the jury to decide the issue of materiality could operate to invalidate Congressman Swindall's perjury conviction in light of the rule subsequently announced by this Court in United States v. Gaudin, supra. In holding that the rule in Gaudin would not be applied retroactively to invalidate Swindall's conviction, the Eleventh Circuit distinguished the precise situation implicated in this case:

> Moreover, Appellant does not assert that the judge used a less exacting standard than "beyond a reasonable doubt" in its determination that the false statements were

material, which would implicate the accuracy of the materiality finding.

Id. at 836.[4]

The language quoted above was part of the Eleventh Circuit's analysis of whether the rule announced by this Court in United States v. Gaudin, supra, which "reallocated fact-finding from judge to jury on the single issue of materiality," would affect the judgment in Swindall, a decision that preceded Gaudin by several years. The Eleventh Circuit concluded that because the proper standard had been applied, albeit by the wrong fact-finder, the Swindall conviction would stand.

In the coram nobis order appealed from in this case, in stark contrast, the trial court essentially conceded that it did not perform *any* fact-finding and, therefore, did not employ a reasonable doubt standard prior to instructing the jury that the subject matter of Petitioner's allegedly false statements was material to the proceedings in which those statements were made. Because these errors constitute the trial court's use of a "less exacting standard than 'beyond a reasonable doubt'" (Swindall 107 F.3d at 836), its erroneous direction to the jury that materiality had been established by the government as a matter of law undermined the fundamental fairness of Petitioner's trial and altered the constitutional calculus guaranteed to every criminal defendant. Nutter v. White, 39 F.3d at 1158.

In short, because In re Winship, Cage v. Louisiana, Sullivan v. Louisiana and Constitutional principles of due

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[4] In its decision in this case, the Eleventh Circuit characterized this portion of its decision in Swindall as "a notch left open" in Swindall through which Petitioner "attempt[s] to slide." Appendix, Exhibit 2, Page XI.

process require that each element of a crime be proven beyond a reasonable doubt in order to support a conviction, and because the trial court in this case did not utilize this standard to decide the element of materiality, it is clear that the district court's decision denying the writ of error coram nobis should have been reversed.

2. In reaching its erroneous decision, the Eleventh Circuit misapplied this Court's decision in Teague v. Lane.

In Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989), this Court explained the procedure to be followed in deciding whether constitutional rules that were not in existence at the time a conviction became final--so-called "new rules"-- should be accorded retroactive effect. However, because Petitioner argues that his trial was tainted by an "old rule" error -- an error as old as In re Winship --his claim is not Teague-barred.

In United States v. Swindall, supra, the Eleventh Circuit held that Swindall's convictions had become final before the case on which he relied -- Gaudin -- was announced and that Gaudin announced a "new rule." It then focused on whether the newly-announced rule in Gaudin -- that the jury, not the judge, decide the element of materiality in a perjury prosecution -- rose to the level of a "watershed rule[ ] of criminal procedure implicating fundamental fairness and accuracy of the criminal proceedings." Swindall, 107 F.3d at 835 (quoting Caspari v. Bohlen, 510 U.S. 383, 396, 114 S. Ct. 948, 127 L.Ed.2d 236 (1994)). The Eleventh Circuit found that it did not and observed that Gaudin merely corrected the error that "the wrong entity was making the decision." This, the Court of Appeals said, was not a new rule that "implicated the accuracy of a conviction" as, for example, a faulty jury instruction on the definition of "beyond a reasonable doubt" would. Id., 107 F.3d at 836

(citing Nutter v. White). In denying the relief Swindall sought, the Court concluded by observing:

> Moreover, Appellant does not assert that the judge used a less exacting standard than "beyond a reasonable doubt" in its determination that the false statements were material, which would implicate the accuracy of the materiality finding.

Swindall, 107 F.3d at 836. Implicit in the Eleventh Circuit's observation that Swindall pointed to no record evidence that the judge decided the issue of materiality without applying a "beyond a reasonable doubt" standard, is that *had* such record evidence been presented, Swindall would have prevailed. This is because the Teague retroactivity rules have no bearing when the error involves a Constitutional principle that was in force at the time of trial.

Supporting such a conclusion is the Eleventh Circuit's own decision in Nutter v. White, 39 F.3d 1154 (11th Cir. 1994). In Nutter, the appellant successfully sought review of the trial court's denial of his habeas corpus petition by convincing the Eleventh Circuit that the trial court should have considered his challenge to the jury instruction on the definition of "beyond a reasonable doubt" that was given at the trial that resulted in his conviction. Nutter argued that the reasonable doubt instruction in his case violated the rule set forth in Cage v. Louisiana, supra, which held that jury instructions on reasonable doubt that used phrases such as "grave uncertainty," "substantial doubt," and "moral certainty," were unconstitutional because they allowed the jury to convict on a standard less than "beyond a reasonable doubt." Cage, 498 U.S. at 41. Nutter went on to argue that a subsequent Supreme Court decision, Sullivan v. Louisiana, supra, held that Cage violations are not harmless error, but rather, require reversal. Nutter, 39 F.3d at 1156.

The trial court found that the Cage decision should not be applied retroactively and denied Nutter's petition. Limiting itself to the consideration of the issue of the retroactive application of Cage, the Eleventh Circuit reversed and remanded to the trial court, holding that:

> The reasonable doubt standard represents a social calculus between the relative consequences of unjust conviction and incorrect acquittal. . . . Cage recognizes that jury instructions implying a lesser standard than reasonable doubt eviscerate this constitutional calculus. . . . Thus, here we confront one of those rare instances where our interest in certainty is so clearly implicated that finality interests must be subordinated.

Nutter, 39 F.3d at 1158 (citations omitted).

Here, also, had the Eleventh Circuit properly interpreted Petitioner's argument, it would have recognized that Teague had no applicability. Instead, the Eleventh Circuit misread Petitioner's challenge as one implicating a Gaudin-type error. This mistake led to its resort to Teague and the ensuing analysis of the retroactive application of a "new rule." As the foregoing discussion makes clear, the error complained of by Petitioner – the failure to employ the In re Winship reasonable doubt standard – should have been construed as an "old rule," and the reversal of the trial court's dismissal of the coram nobis petition was warranted.

II. There is a conflict among the circuits on the important question of what showing of collateral consequences must be made in order to obtain coram nobis relief.

In its decision affirming the denial of Petitioner's petition for a writ of error coram nobis, the Eleventh Circuit

incorrectly concluded that Petitioner could not demonstrate sufficient collateral consequences so as to entitle him to a writ of error coram nobis. In reaching its erroneous conclusion, the Eleventh Circuit relied upon a highly restrictive view that appears to be recognized only by the Seventh Circuit Court of Appeals, and ignored the majority view, which espouses a much more reasonable approach. Because, as is discussed below, a clear split in authority exists among the circuits on the important, threshold question of the degree to which a coram nobis petitioner must establish collateral consequences, this petition for certiorari should be granted.

For example, the approach embraced by the Fourth and Fifth Circuit Courts of Appeal is representative of the more reasonable majority view, inasmuch as those courts have significantly eased the burden of demonstrating collateral consequences, consistent with decisions of this Court. See United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989); United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989).

In United States v. Marcello, supra, the Fifth Circuit granted a coram nobis petition without identifying *any* continuing disabilities from which the petitioner suffered. In granting the relief sought, the court addressed the collateral consequences requirement by holding that the petitioner "must be absolved of the consequences flowing from his branding as a federal felon." Id. at 1154.

Similarly, in United States v. Mandel, supra, the Fourth Circuit granted a petition for a writ of error coram nobis without raising the issue of collateral consequences. In holding that the relief sought was appropriate, the court emphasized that:

> Without coram nobis relief, the petitioners, who contested their guilt at each stage of the proceeding, would face the remainder of their lives branded as criminals . . . .

Id. at 1075. The Fourth Circuit reiterated this concern by quoting from Parker v. Ellis, 362 U.S. 574, 80 S. Ct. 909, 4 L.Ed.2d 963 (1960), in which this Court noted that:

> Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.

Id.

Perhaps the strongest proponent of the majority rule is the Ninth Circuit, which, like the Fourth Circuit, has relied upon Supreme Court precedent to hold that the existence of collateral consequences is presumed as a result of an invalid conviction, irrespective of actual present consequences. See Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Byrnes v. United States, 408 F.2d 599 (9th Cir. 1969). In Hirabayashi, supra, the court relied upon the Supreme Court's decision in Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L.Ed.2d 917 (1968), in concluding that there exists no requirement in the law that a petitioner establish specific legislative disabilities in order to obtain a writ of error coram nobis. Hirabayashi v. United States, 828 F.2d at 606.

Later, in United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989), the Ninth Circuit reiterated the "liberal presumption" that collateral consequences result from an invalid criminal conviction and emphasized that the burden of disproving this presumption rests on the government.

Moreover, the court in Walgren noted as a basis for its decision granting coram nobis relief to the petitioner the fact that the petitioner could be impeached with the invalid conviction if ever called to testify in court. Id. at 1422.[5]

As the record before the district court and the Eleventh Circuit unequivocally demonstrated, Petitioner has been severely hampered in his ability to run his company's business solely by virtue of his status as a convicted perjurer. This status has had the very negative effect contemplated by this Court in Parker v. Ellis, 362 U.S. 574, 593-94, 80 S. Ct. 909, 4 L.Ed.2d 963 (1960), inasmuch as Petitioner's economic opportunities have been adversely impacted. In addition, the inability to testify without the fear of impeachment has become a very real and present concern to Petitioner.

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[5] It should also be noted that an approach very similar to the majority view has been utilized by this Court in order to determine the analogous issue of whether a habeas corpus petition has become moot as a result of the petitioner's unconditional release from confinement, or whether adverse collateral consequences still remain. For example, in Evitts v. Lucey, 469 U.S. 387, 391 n. 4, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985), this Court stated:

> [R]espondent has not been pardoned and some collateral consequences of his conviction remain, *including the possibility* that the conviction would be used to impeach testimony he might give in a future proceeding and *the possibility* that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future. This case is thus not moot.

Id. (Emphasis added).

Indeed, as Petitioner demonstrated in the courts below, he has been unable to assert his company's rights against a dishonest employee due to his inability to provide unimpeachable testimony on behalf of the company. Under these circumstances, it is abundantly clear that had the Eleventh Circuit applied the majority approach, it would have concluded that Petitioner has demonstrated that collateral consequences have ensued, and will continue to ensue, as a result of his invalid conviction.

Here, the Court should resolve the differences among the circuits relative to this important question by endorsing the less restrictive view espoused by the majority of courts that have examined the issue of collateral consequences. There is no valid rationale for adopting the overly restrictive, minority view applied by the Eleventh Circuit, and this Court should not adopt that less reasoned approach. Rather, consistent with its decisions in Parker v. Ellis, supra, and Sibron v. New York, supra, this Court should resolve the split in the circuits in favor of the majority approach.

CLOSING

For the reasons discussed above, Petitioner respectfully requests that the Court grant his Petition for a Writ of Certiorari.

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APPENDIX EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CRIMINAL ACTION

v.

1:83-cr-127-MHS

ALMON BRASWELL,

Defendant.

ORDER

This action is before the Court on defendant's petition for a writ of error coram nobis. For the reasons stated below, the Court denies the petition.

Background

In 1983, defendant was tried for perjury in this Court. One of the elements of the crime of perjury, under 18 U.S.C. § 1623, is proof that the false statement made under oath was material. At the time of defendant's trial, it was the law in this circuit that materiality was a question of law for the Court to decide. See United States v. Lopez, 728 F.2d 1359, 1362 n. 4 (11th Cir.), cert. denied, 469 U.S. 828 (1984). Accordingly, the Court determined at defendant's trial that the statements he made under oath were material and so instructed the jury. Defendant did not object to the Court's

treatment of the materiality issue. The jury found defendant guilty on one count of perjury, and defendant did not appeal his conviction. The Court sentenced defendant to three years' imprisonment, but reduced defendant's sentence to time served in August, 1984.

In 1995, the United States Supreme Court held that the materiality element of perjury is an issue of fact for the jury. United States v. Gaudin, 515 U.S. 506 n.1 (1995). In United States v. Swindall, 107 F.3d 831 (11th Cir. 1997), the Eleventh Circuit held that the ruling in Gaudin would not be applied retroactively in habeas cases. As an aside, however, the Swindall Court questioned whether a conviction for perjury must be vacated when a trial judge mot only decided the materiality issue himself, but also determined the element under a standard of proof less than "beyond a reasonable doubt."

Here, defendant raises that question directly by contending that the Court used a standard less exacting than "beyond a reasonable doubt" when deciding materiality during his trial. Accordingly, he contends, the principle announced in Gaudin should be applied retroactively to his case through the issuance of a writ of error coram nobis, his conviction should be vacated, and he should be afforded a new trial.

Discussion

A writ of error coram nobis, a rarely used means for correcting erroneous final judgments, should be issued only in extraordinary circumstances where an egregious error has occurred. To secure a writ of error coram nobis, defendant must show that the error at trial was of such a fundamental character that it "render[ed] the proceeding . . . irregular and invalid." Moody v. United States, 874 F.2d 1575, 1576-77 (11th Cir. 1989). He has the burden of establishing not only

that the error occurred, but also that it resulted in a "complete miscarriage of justice." Klein v. United States, 880 F.2d 250, 253 (10th Cir. 1989) (citing United States v. Morgan, 346 U.S. 502, 512 (1954)). Furthermore, defendant must demonstrate "sufficient detrimental collateral consequences" to warrant the grant of a new trial fourteen years after his case was first litigated, United States v. Hav, 702 F.2d 572, 574 (5th Cir. 1983), and must also show that he would be entitled to a writ of habeas corpus, pursuant to 28 U.S.C. § 2255, if he were still incarcerated.

The Court concludes that defendant has failed to satisfy any of the requirements for a writ of error coram nobis. Accordingly, the Court denies defendant's petition and dismisses this action.

First, the Court finds that the alleged error did not result in a miscarriage of justice because defendant can make no plausible claim that the false statements for which he was prosecuted are immaterial.[1] Conspicuously absent from defendant's motion and briefs is any mention of the actual statements for which he was convicted of perjury. The government's evidence shows that defendant was called as a witness in a grand jury investigation into the business activities of Salvatore Boriello. Under oath, defendant testified that he had no business transactions with Boriello other than a certain "deal for t.v. time." The truth, however, was that defendant had frequent and routine business dealings--both legal and illegal--with Boriello that were

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[1] For similar reasoning, see Johnson v. United States, 520 U.S. 461, 117 S. Ct. 1544, 137 L.Ed.2d 718 (1997), which held that a district court's failure to submit materiality to the jury in a perjury trial did not "affect substantial rights"--and thus did not justify reversal of defendant's conviction on direct appeal--because defendant had no plausible argument that his false statements were immaterial.

central to the investigation. The Court finds that no reasonable jury could possibly have failed to conclude beyond a reasonable doubt that these statements were material, and thus the alleged error resulted in no miscarriage of justice.

Second, defendant has presented no evidence that the Court failed to determine the materiality issue beyond a reasonable doubt.[2] Defendant claims only that the Court stated during sentencing that the case against defendant was "not overwhelming." However, there is no evidence that this comment referred to the materiality issue, as opposed to any other element of the crime. Thus, defendant has failed to satisfy his burden to demonstrate that the error even occurred at all.

Third, defendant has alleged insufficient collateral consequences to merit relief under a writ of error coram nobis. Such consequences must be actual civil disabilities flowing from the conviction. Morgan, 346 U.S. at 512-13. Here, defendant contends that his perjury conviction has affected his reputation and finances--neither of which injury is adequate to justify issuance of the writ. Hav, 702 F.2d at 574. Defendant's claim that the impeachment value of the conviction compelled him to take an Alford plea in another case and prevents him from serving as an effective witness are likewise insufficient because they do not constitute continuing *legal* disabilities. See Morgan, 346 U.S. at 512-13. Defendant is not legally prevented from testifying, but merely perceives that he would not be an effective witness--an injury insufficient to sustain his claim.

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[2] More importantly, it is unclear whether any "burden of proof" is ever applied to questions of law. Something either is or is not the law; there are no degrees analogous to burdens of proof in fact finding.

Finally, defendant has failed to establish that he would be entitled to a writ of habeas corpus if he were still incarcerated. It is already established that the rule announced in Gaudin, that materiality is a question of fact for the jury is a "new rule" under Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989), and is thus inapplicable to convictions finalized before the rule was announced. Swindall, 107 F.3d 831. Defendant argues that his claim is different, however, because the Court's alleged failure to determine materiality beyond a reasonable doubt violated the well-established principle that all elements of a crime must be proved by that standard. According to defendant, therefore, he seeks relief under an old rule, the retroactive application of which is mandated in Teague.

However, if the rule under which defendant seeks relief is indeed an "old" rule that precedes defendant's original conviction, as he alleges, then his claim fails for another reason--because it is procedurally barred. Because defendant did not object at trial to the Court's alleged determination of materiality according to some lesser standard than "beyond a reasonable doubt" or raise that issue on direct appeal, he must demonstrate cause and prejudice for the procedural default. Sawyer v. Whitley, 505 U.S. 333, 338 (1992). While defendant may advance good cause for failure to raise this claim on direct review, he is unable to demonstrate actual prejudice resulting from the error because he has made no plausible claim that his statements under oath were immaterial. Accordingly, defendant is not entitled to collateral relief.

Summary

For the foregoing reasons, the Court GRANTS plaintiff's motion for leave to file a supplemental response [#7-1], DENIES defendant's application for a writ of error coram nobis [#1-1], and DISMISSES this action.

IT IS SO ORDERED, this 29 day of January, 1998.

/S/
Marvin H. Shoob,
Senior Judge

United States District
Court Northern District
of Georgia

APPENDIX EXHIBIT 2

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-8529

D.C. Docket No. 1:83-cr-127-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus,

ALMON GLENN BRASWELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(October 4, 1999)

Before MARCUS, Circuit Judge, HILL, Senior Circuit Judge, and ADAMS, District Judge.

PER CURIAM:

Almon Braswell appeals from the district court's order denying his petition for a writ of error coram nobis. We review the district court's decision *de novo*. *See United States v. Swindall*, 107 F.3d 831, 833 (1997). After thorough review of the briefs and the record, we affirm.

I.

On September 15, 1983, a jury found Braswell guilty of one count of perjury, in violation of 18 U.S.C. § 1623. The district court sentenced Braswell to three years of imprisonment to run concurrently with sentences imposed in mail and tax fraud cases then pending against him. Braswell did not appeal his conviction, nor did he request habeas corpus relief pursuant to 28 U.S.C. § 2255 while in prison. Many years after completing his sentence, appellant now requests a new trial pursuant to a writ of error coram nobis, alleging that his conviction was unconstitutional. Specifically, he contends that the district court erroneously determined materiality of the allegedly false statement using a standard falling short of the constitutionally-mandated reasonable doubt standard. He adds that, despite his release from prison, he continues to suffer adverse consequences resulting from the conviction, including considerable expense incurred in connection with psychological therapy, loss of credibility in business dealings, and impediments in pursuing civil lawsuits.

In *United States v. Morgan*, 346 U.S. 502,74 S.Ct. 247 (1954), the Supreme Court held that the All Writs Act, 28 U.S.C. § 1651(a), gives federal courts the authority to issue writs of error coram nobis. Nevertheless, this extraordinary remedy provided by the writ is limited in scope and can only be justified in compelling circumstances necessary to achieve justice. Id. at 507-511. "[S]uch compelling circumstances [exist only] when the error involves a matter of fact of the most fundamental character

which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Moody v. United States*, 874 F.2d 1575, 1576-77 (11th Cir. 1989), *cert. denied* 483 U.S. 1081 (1990).

Moreover, the petitioner must also demonstrate sufficient detrimental collateral consequences, i.e., actual civil disabilities flowing from the conviction, that no other remedy is available, *and* that the requirements of 28 U.S.C. § 2255 can be met. *See Swindall*, 107 F.3d at 834; *United States v. Russell*, 776 F.2d 955, 957 n.1 (11th Cir. 1985); *Waller v. United States*, 432 F.2d 560,561 (5th Cir. 1970). The appellant has failed to meet these stringent requirements. First, and most importantly, he can demonstrate no error. Braswell argues, essentially, that the judge at his trial determined the question of materiality utilizing a standard other than proof beyond a reasonable doubt. He attempts to support this argument with an affidavit by the trial attorney, Mark Kadish.[1] Kadish merely submitted that the trial court, and not the jury, determined the issue of materiality; nowhere did he state that the trial court determined materiality by a standard of less than reasonable doubt. We agree fully with the district court that Kadish's affidavit does not support Braswell's claim. We add that simply because the trial court, at the sentencing phase, described the government's evidence as "not overwhelming," does not lend support to appellant's position that the trial court applied a lower standard of proof. To the contrary, the fact that the district court chose not to grant defendant's motion for a judgment notwithstanding the verdict evidences the court's belief that the evidence was sufficient to support appellant's conviction. Moreover, appellant has not presented any plausible argument that the

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[1] Due to the extended lapse of time, the trial transcript is no longer available. Only limited portions of the sentencing transcript and transcripts of petitioner's guilty pleas in related cases are part of the record on appeal.

false statements he made under oath were not material to the grand jury's investigation. For these reasons, Braswell has not established error, nor has he demonstrated that the claimed error rendered the proceeding itself irregular or invalid.

Moreover, Braswell has not alleged sufficient collateral consequences to warrant relief. While he alleges injury to reputation and finances, neither injury is sufficient. *See United States v. Keane*, 82 F.2d 199, 203-04 (7th Cir. 1988). Braswell also argues that because of his conviction, which could have been used to impeach him in a criminal proceeding, he was compelled to take an "*Alford* plea." But appellant could not be legally compelled to plead guilty to any offense, nor is he legally prevented from testifying at any judicial proceeding. Appellant's belief that his effectiveness as a witness would be undermined is not enough to establish sufficient collateral consequences. We add that even if Braswell's previous conviction was vacated, he might still be impeached at trial with conduct underlying his convictions both for mail fraud and tax fraud. See Fed.R.Evid. 609 (a)(2).

Coram nobis relief is also barred to Braswell since he cannot meet the requirements justifying relief under § 2255. In *Swindall*, we held that if a claim "is *Teague*-barred, then it is clearly outside the extremely limited scope of a writ of coram nobis." 107 F.3d at 834 (discussing *Teague v. Lane*, 489 U.S. 288 (1989)). We reasoned that "if *Teague* bars a petitioner's claim relying on a case decided after his conviction and sentence became final, then he has not suffered such compelling injustice that would deserve relief pursuant to a writ of error coram nobis." *Id.*

We summarized *Teague*'s three-step analysis as follows: (1) Whether the *Teague* rule is applicable, i.e. whether the petitioner's conviction became final before the

case upon which he relies was announced; (2) whether the case upon which the petitioner relies announced a "new rule"; and (3) whether either of the two exceptions to the non-retroactivity of a new rule is applicable. *See Swindall*, 107 F.3d at 834-35. Those two exceptions are: (1) if the rule places a "class of private conduct beyond the power of the government to proscribe" or removes a "class of defendants from a certain type of punishment," 107 F.3d at 835; or (2) if it "involves new 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings.'" *Id.*, citing *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994).

Appellant's argument that his claim is not *Teague*-barred is an attempt to slide through a notch left open in *Swindall*. In *Swindall*, which like this case involved a perjury conviction, the coram nobis petitioner argued that under the new rule announced in *United States v. Gaudin*, 515 U.S. 506 (1995) that materiality was a question for the jury, it was error for the district court and not the jury to have determined the issue of materiality at his trial. Further, the petitioner argued, *Gaudin*'s new rule fell within *Teague*'s second exception because of our decision in *Nutter v. White*, 39 F.3d 1154 (11th Cir. 1994), in which we held that the rule announced in *Cage v. Louisiana*, 489 U.S. 328 (1990), that due process was violated where certain incorrect jury instructions allowed the jury to convict the defendant on a standard of proof lower than reasonable doubt, was a "'watershed rule of criminal procedure implicating fundamental fairness and due process.'" *Nutter*, 39 F.3d 1157 (citing *Graham v. Collins*, 506 U.S. 461, 476 (1993). We rejected these arguments, noting that the harm to be corrected in *Gaudin* did not involve the accuracy of the conviction but rather that the wrong entity was making the decision. Further, we observed that the Supreme Court never suggested in *Gaudin* that a judge's ruling during the years the prior rule prevailed was incorrect. We explained: "Appellant does not

assert that the judge used a less exacting standard than 'beyond a reasonable doubt' in its determination that the false statements were material, which would implicate the accuracy of the materiality finding." *Swindall*, 107 F.3d at 836. Since appellant cannot provide any factual basis for his argument that the trial court might have used the less exacting standard, his claim is essentially the same as the one raised in *Swindall*, and is *Teague*-barred.

In short, Braswell has failed to make any of the showings necessary to entitle him to the extraordinary remedy of writ of error coram nobis. Accordingly, we affirm the order of the district court.

AFFIRMED.